posed upon them? As the case originally stood, the only averment was—"In particular, the Commissioners of Police at the adoption in 1860, as aforesaid, of the Police and Improvement (Scotland) Act 1850, took over the said streets as sufficiently paved in terms of said and amending Acts, and in point of fact it was well and sufficiently paved then, and up to the date, in August 1882, of the Commissioners' operations." Now, this is obviously irrelevant, because it refers to a street and not to a foot-pavement. The record was accordingly amended, and the answer to art. 3 now runs thus—"Explained and averred that the section of the General Police and Improvement (Scotland) Act 1862, mentioned in the requisition, is inapplicable, and that the said requisition notice is unwarranted and without statutory authority. In particular, the Commissioners of Police at the adoption in 1860, as aforesaid, of the Police and Improvement (Scotland) Act 1850, took over the said street, including the footway in question, as already sufficiently formed and constructed and sufficiently paved in terms of said and amending Acts, and in point of fact the said street, including the footway in question, was already sufficiently formed and constructed, and the said footway continued in that condition. It was well and sufficiently paved then, and up to the date, in August 1882, of the Commissioners' operations, at least so far as regards the footway of said street where it fronts the defenders' property. It is further explained and averred that the works detailed in the pursuers' specification, and which the defenders were called upon to execute, amount to a reconstruction of the footway." As to the latter part of these amendments, what is there set forth is met, I think, by what I have already stated regarding the different items of the account. The work executed by the pursuers is undoubtedly of the nature of a repair, while the averment of the defenders comes to this, that there was a good footway prior to 1860, and that as during the two years which elapsed between the adoption by the Commissioners of the Act of 1850 and the passing of the Act of 1862, they were not called upon to do anything to this footway, they are to be freed in the future from all expense connected with its upkeep. I do not understand that the amendment goes the length of averring that the Commissioners adopted this footway or accepted it from the defenders to the effect of undertaking the cost of all future repairs upon it. There is no minute in the books of the Commissioners referring to this, nor has any acceptance or understanding to that effect by them been produced. The Act of 1862 is adopted, and then in course of time it is discovered that this footway, like most other human structures, has become worn out and stands in need of repairs. Are the owners of the adjoining property in such circumstances not liable for the repairs? If, indeed, there was anything to be found in the statute supporting the idea that once a footway was put in good order by the owners, and accepted as in that condition by the Commissioners, that then it was to be maintained by them in time coming, that would go a long way to answer the contentions of the pursuers here. There is such a provision in the Act no doubt as to streets, but not as to foot-pavements. The defenders also appeal to sec. 149 by way of showing that under its provisions only footways constructed under it fall to be maintained by the owners of the adjoining ground, but I cannot give this section any such limited interpretation. The Commissioners here have pronounced this footway to be in a state of disrepair—a good road has to be made, and the expense thereby incurred falls to be borne by the owners of the ground. I therefore agree with the view of this case taken by the Sheriff, and I think his interlocutor must be affirmed and the appeal refused.

LORDS MURE and SHAND concurred.

LORD DEAS was absent.

The Court refused the appeal.

Counsel for Pursuers (Respondents)—Pearson. Agents—Stuart & Stuart, W.S.

Counsel for Defenders (Appellants)—Comrie Thomson. Agents—Horne & Lyell, W.S.

Tuesday, March 18.

FIRST DIVISION.

[Lord Fraser, Ordinary.

HENRY *v.* MILLER.

Proof—Evidence—Receipt for Rent—Proof prout de jure—*Delivery.*

In an action for the half-year's rent of a dwelling-house due at Whitsunday 1882, the defender produced a receipt for the rent due at that term, and averred that he had paid the amount. The pursuer averred that he had sent a note containing the receipt at Whitsunday 1882, but that the rent had never been paid, and that he had forgotten about the matter until Whitsunday 1883, when he demanded payment. The rents due at Martinmas 1882 and Whitsunday 1883 had been paid, and there was no averment of fraud. *Held* that the pursuer was entitled to a proof *prout de jure* of his averments.

This was an action at the instance of Alexander Henry, proprietor of the dwelling-house No. 5 Barnton Terrace, against John Miller, civil engineer, tenant of that house, for the sum of £63 with interest—£31, 10s. being the rent for the half-year ending Whitsunday 1882, and £31, 10s. being the rent for the half-year ending Martinmas 1883.

The defender was tenant of the house as a yearly tenant from Whitsunday 1876 to Whitsunday 1884. The pursuer stated that the rents had been paid half-yearly, with the exception of those sued for. The defender admitted liability for the half-year's rent due at Martinmas 1883, but averred that in May 1882 he paid the half-year's rent due at the term of Whitsunday in that year, conform to receipt which he produced, in these terms:—

"*Edinburgh, 15th May* 1882.—Received from John Miller, Esq., C.E., the sum of Thirty-one pounds ten shillings sterling, being rent of house No. 5 Barnton Terrace, for the half-year ending

Whitsunday Eighteen hundred and eighty-two, which half-year's rent is hereby discharged.

"£31, 10s. 0d. ALEXR. HENRY."

The pursuer averred "(Cond. 6)—The pursuer duly applied for payment of the said rent which became payable at Whitsunday 1882 as aforesaid, the application therefor having been made by note containing receipt for the same, which was retained and acknowledged on behalf of the defender by post-card dated 16th May 1882, wherein it was stated that the defender was in London, in consequence whereof no settlement was obtained. Thereafter, on 21st May 1882, the defender wrote the pursuer, stating that on his return from England in the end of the same week he would pay the said rent, but nevertheless the same still remains unpaid."

To this the defender replied that on his return from England he paid the amount of the rent, and received in exchange the receipt produced. The rents due at Martinmas 1882 and Whitsunday 1883 had been paid, and the receipts were produced. No demand for the rent due at Whitsunday 1882 was made after the receipt was sent, until 30th May 1883, when Mr Alexander Brown, the pursuer's clerk, wrote this letter to the defender—"Referring to my call upon you on 16th inst., I will be glad to know whether you have yet satisfied yourself that the half-year's rent due at Whitsunday 1882 is still unpaid. I sent the receipt out at that term, and the messenger returned, saying that he had been requested to leave it, and that you would send a cheque for the amount due; but I never received the cheque. The matter, however, had escaped my memory, and it was only the fact of your having deducted two years' income-tax from the year's rent paid at Whitsunday last that brought it again to my recollection."

The defender stated that he was willing to pay the half-year's rent due at Martinmas 1883 on receiving an ordinary receipt for it, but that the pursuer insisted on inserting a protest that the rent due at Whitsunday 1882 was in arrear.

The defender pleaded—"The pursuer's averments are irrelevant and insufficient, and, *separatim*, can only be proved by the writ or oath of the defender."

The Lord Ordinary (FRASER), on 5th February 1884, allowed the pursuer a proof *prout de jure* of his averments, and to the defender a conjunct probation.

"*Opinion.*—The pursuer claims payment of a half-year's rent due at Whitsunday 1882, to which the defender replies by producing a receipt for payment in the following terms:—

"*Edinburgh, 15th May* 1882.—Received from John Miller, Esq., C.E., the sum of Thirty-one pounds ten shillings sterling, being rent of house No. 5 Barnton Terrace, for the half-year ending Whitsunday Eighteen hundred and eighty-two, which half-year's rent is hereby discharged.

"£31, 10s. 0d. ALEXR. HENRY."

"The defender also produces receipts for the half-years' rents due at Martinmas 1882 and at Whitsunday 1883, and the pursuer acknowledges that these two last half-years' rents were received by him. But his averment in regard to the rent payable at Whitsunday 1882 is, that he sent the receipt for that term to the defender without having obtained payment, that the defender retained the receipt and never paid the rent, and that he, the pursuer, forgot about the matter until he was reminded of it, as explained by him in a letter dated 30th May 1883. The pursuer has not described this conduct on the part of the defender as fraudulent, and perhaps it is not so. The matter was only brought to the defender's notice a year after the term's rent became due, and after he had paid the two subsequent rents, and he may have forgotten the non-payment of the rent of Whitsunday 1882—all the more that he had the receipt for it in his possession. But at the same time the case stated for the pursuer is one in regard to which there ought to be an inquiry, and this not limited to writ or oath. There are precedents to this effect (see *Smith* v. *Kerr*, 5th June 1869, 7 Macph. 863; *Kirkwood* v. *Bryce*, 17th March 1871, 8 Scot. Law Rep. 435; *Crawford* v. *Bennet*, 19th June 1827, 2 W. & S. 608; *Rhind* v. *Commercial Bank*, 1860, 3 Macq. 643, Ersk. iii. 4, 5)."

The defender reclaimed, and argued—The proof should be limited to the writ or oath of the defender, because he was in possession of the appropriate voucher, and there was no averment of fraud. The Court will not allow a person to be cheated, and therefore if fraud is averred a proof *prout de jure* will be allowed; but a pursuer who has only himself to blame is not entitled to a general proof. The fact that various transactions had passed between the parties without a word of this matter being raised excluded proof—*Anderson* v. *The Forth Marine Insurance Co.*, Jan. 15, 1845, 7 D. 268.

Pursuer's authorities—Cases cited in the Lord Ordinary's opinion, and *Ferguson, Davidson, & Co.* v. *Jolly's Trustee*, Jan. 22, 1880, 7 R. 500.

At advising—

LORD PRESIDENT—By this summons the pursuer demands payment of the sum of £31, 10s., being one half-year's rent of the house No. 5 Barnton Terrace, Edinburgh, of which he is proprietor, and which is occupied by the defender.

The answer which the defender makes is to produce a receipt for the rent demanded. To this the pursuer replies, that although the defender is in possession of the receipt, yet he never paid the money. The precise allegation made by the pursuer is to be found in article 6 of the condescendence—"The pursuer duly applied for payment of the said rent, which became payable at Whitsunday 1882 as aforesaid, the application therefor having been made by note containing receipt for the same, which was retained and acknowledged on behalf of the defender by post-card, dated 16th May 1882, wherein it was stated that the defender was in London, in consequence whereof no settlement was obtained." On the other hand, the defender avers that as soon as he returned from London, some days subsequent to the term, he paid the amount of the rent, and got in exchange the receipt produced. That raises a question of fact, whether the receipt for rent was ever properly delivered to the defender? It might have got into his hands without delivery, for delivery implies a consent that the document shall become a delivered evident.

If the pursuer proves his averment, then the note was sent on the term-day for the purpose of reminding the defender that the rent was due, and not as an acknowledgment of money received.

But the statement of the defender is that he got the receipt in exchange for money instantly paid.

The point, then, is, whether as regards this question of fact a proof should be allowed *prout de jure*, or confined to the writ or oath of the defender? The question is not unattended with difficulty, and there was one case relied on by the defender which at first sight seemed to be an authority in his favour, but I think that it is capable of an explanation consistent with the allowance of proof by the Lord Ordinary.

The case I refer to is that of *Anderson, & Company* v. *The Forth Marine Insurance Company*, 7 D. 268. It appears in that case that a policy of marine insurance for £892, 4s. 7d., as ascertained, had been effected by the pursuers with the defenders. The whole transaction had been carried through by agents acting for the insured and for the insurance company. On the back of the policy there was indorsed by the agent for the insured a receipt for the sum of £400. That, it was said, was a settlement between the two agents, and neither of the parties had anything personally to do with it. There stood the receipt for £400, and the defender having produced the policy with this receipt by the agent, the pursuer offered to prove by parole and letters that that money was not paid in terms of the receipt, but that some arrangement had been entered into between the agents. It was not said that the Forth Marine Insurance Company had not paid the money; on the contrary, it was distinctly shown that they had allowed credit for the amount in settling with their agent, who had become bankrupt. The essential difference therefore between that case and this is, that it was there conceded by the party who tried to get the better of the receipt that the money had been paid. That takes off the weight of that case. The evidence was there disallowed by Lord Justice-Clerk Hope, and a bill of exceptions was also disallowed by the Court. In that judgment I must say I should have concurred. Here, however, the question is whether the money was paid—that is to say, whether the receipt was delivered as a receipt for money paid. It is somewhat a new case, and it was contended very powerfully that unless fraud were averred it was impossible to allow a general proof. It is clear that a document, whether of debt, which this is not, or a receipt for money, may get into wrong hands either accidentally or by error. And there appear to be no good grounds why, if it can be proved that the document got into wrong hands through fraud, it should not also be competent to prove that it got into wrong hands by error or accident.

Questions of this sort do not often arise, and one is surprised that they do not, having regard to the looseness with which receipts for rent and for interest are handed about. This is only to be explained by the good faith of those into whose hands they come, in not seeking to take advantage of the occurrence.

But it is by no means uncommon for a document of debt, such as a bond or an I O U, to get into wrong hands. Then, however, there is a strong presumption for *chirographum apud debitorem repertum præsumitur solutum*. Although, however, that is the legal presumption, it is liable to be taken off by evidence that it has got into the hands of the debtor without the consent of the creditor. Erskine states—"This presumption . . . . may be elided by positive evidence that the ground of debt came into the hands of the debtor otherwise than by the creditor's consent;" and he does not give the slightest hint that upon that point the proof is to be of a limited character, or confined to the defender's writ or oath. That kind of case, though not exactly in point, forms an important analogy. For if evidence of a general description is available for the purpose of showing that a document of debt has got into the hands of the debtor without any money having been paid, why should such evidence not be competent to show that a receipt has got into the hands of the debtor instead of remaining in the hands of the creditor. In the same manner there is a case which illustrates the principle laid down by Erskine—in the case of *Knox* v. *Crawford*, 24 D. 1088, decided in the Second Division when I presided there. That was an action raised for the recovery of money advanced on loan. The two I O U's which were the documents of debt were in the hands of the debtor, the creditor was deceased, and the parties suing were his representatives. The issue adjusted for the trial of the case was in these terms —"Whether, in or about the month of January 1861, the defender obtained possession of the said acknowledgment from the said Robert Burn, without the debt thereby acknowledged having been paid or otherwise extinguished." So that that case settles that a question of such a kind should be tried in the ordinary form. The case of a document of debt is not precisely the same as that of a receipt, but there is very little difference in principle; for with regard to either it is just the case of a document which has got into wrong hands—into the hands of the debtor instead of the creditor. I am therefore of opinion that the Lord Ordinary is right.

Perhaps the most difficult feature of the case is the lapse of time which has occurred since the receipt passed into the debtor's hands. At first sight I was very much impressed with that fact. The rent was due at Whitsunday 1882, but was not demanded by the pursuer after the first sending of the receipt for a year. His explanation is that he had forgotten all about the matter, and his representation is that the way in which the circumstances attending the sending of the receipt were recalled to his mind was in consequence of a dispute arising about income-tax a year after. Two years' income-tax had been deducted from the rent paid at Whitsunday 1883, and it was then that the whole thing about the sending of the receipt was recalled to his mind.

If the lapse of time were greater I should have a strong sympathy with the defender. It is said that these proceedings were taken too late, and that the memory of a party is not to be taxed with the production of the circumstances attending every payment of £30, but that he is entitled to rely upon the receipt which he has, and state that he has nothing to say, simply producing the receipt. I think the lapse of time is not so great as to justify that conclusion. I am therefore disposed to get over the specialties in the case, and adhere to the interlocutor of the Lord Ordinary by which he allows a proof at large.

Lord Mure—I think this is a question of some

nicety, but I have come to be of the same opinion as your Lordship.

The question is a simple one of fact as to the circumstances under which the receipt came into the hands of the defender, and the averment with regard to that is contained in the 6th article of the condescendence—[*reads as above*]. This receipt was dated 15th May 1882, and it is admitted that it is not a receipt for money paid on that day, for the money is not said to have been paid till after the 28th. On the other hand there was a considerable lapse of time before any demand was made for the half-year's rent. Why no demand was made has not been explained in the correspondence which passed between the parties. It was not until a year after, when the clerk was looking at his books, that payment was asked from the defender.

No fraud has been alleged, for it is conceded that if there had been an allegation of fraud the proof would not have been restricted. The rule which limits the proof has been relaxed, not in the case of receipts of this kind but in the case of bills. The practice for long used to be that a person was only entitled to prove resting-owing by the writ or oath of his debtor, but that rule has now been relaxed. And on the same principle upon which the Court proceeded in relaxing the rule with regard to bills, I think the rule as to receipts of this kind should be relaxed also. We were referred to a case in which the question was whether in the case of a bill the proof was limited to the writ or oath of the holder—the case of *Ferguson, Davidson, & Co.*—in which it was observed that if the averment was that the bill had come into the possession of the holder not in the ordinary course of business, then the inquiry into the question whether value had been given would not be limited. That was in reference to a bill of exchange, but I can see no reason why the rule should not be applied to the case of possession of a receipt. I think, therefore, that the circumstances set forth render it necessary that there should be a proof whether the money is due or not, and that the proof should not be limited. On that ground I am of opinion that the Lord Ordinary is right.

Lord Shand—If this question had arisen immediately after the receipt had come into the defender's hands, I should have been of opinion that there was no difficulty, for the point between the parties is really one of fact whether the receipt was ever delivered.

On one side it is said that the receipt was sent in a letter, and that the defender received it with the qualification that he should either send the money, or else send the receipt back. On the other side it is said for the defender that the document was delivered in return for money paid. Therefore on this issue of fact I think parole evidence would have been competent if the dispute had arisen immediately after the defender got the receipt.

The only point of difficulty is the lapse of time which took place between the sending of the receipt in May 1882 and the demand for payment of the rent, which was not made until May 1883. I have come to be of opinion, however, that the delay is not sufficient to bar the pursuer, and regarding the question as one of delivery I think that parole evidence is competent.

Lord Deas was absent.

The Court adhered.

Counsel for Pursuer—Macfarlane. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Defender—Lang. Agents—Ronald & Ritchie, S.S.C.

Tuesday, March 18.

FIRST DIVISION.

[Sheriff of the Lothians.

MILLER (CHALMERS' TRUSTEE) *v.* M'INTOSH.

Bankruptcy — Ranking — Claim for Damages — Expenses—Action in Dependence at Date of Sequestration.

At the date of the sequestration of a bankrupt's estates an action of damages for £3000 was in dependence against him. The trustee refused to sist himself. The bankrupt defended, without any motion being made to ordain him to find caution for expenses, and thereafter decree was pronounced against him for £20 of damages with £200 of modified expenses. *Held* that the pursuer was entitled to rank in the sequestration for the damages awarded, and also for the expenses, on the ground that they constituted a debt due at the date of the sequestration, the amount of which was subsequently ascertained.

The estates of Walter Chalmers, commission agent, Leith, were sequestrated in March 1882, at which date there was in dependence in the Court of Session an action against him at the instance of William M'Intosh, 1 East Hermitage Place, Leith, concluding for £3000 of damages. Intimation of this action was made on 23d June to Mr Hugh Miller, the trustee on Chalmers' sequestrated estate, but he refused to sist himself, and took no part in the proceedings. On the same day M'Intosh lodged a claim in the sequestration for £3000 damages, but nothing was done on this claim. The bankrupt himself defended the action, and no motion was made that he should be ordained to find caution for expenses.

On 17th October (*ante*, p. 7) the pursuer obtained decree against the bankrupt for £20 damages and expenses as modified. The taxed amount of expenses as modified amounted to £200.

On 12th December M'Intosh lodged a claim in the sequestration, in which he deponed "That Walter Chalmers, commission agent, Yardheads, Leith, is now, and was at the date of the sequestration of his estates, justly indebted and resting-owing to the said deponent the sum of Two hundred and twenty-one pounds and fourpence sterling, as per statement annexed."

On this claim the trustee pronounced this deliverance—"The trustee admits this claim for the sum of £20 sterling, being the amount of damages decerned for in the extract-decree of the Court of Session, dated 17th October 1883. Further, as to the claim for £201, 0s. 4d. sterling,